Radha Krishnan a/l Kandiah v Menteri Sumber Manusia Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R1–25–41 OF 2007
LAU BEE LAN J
2 NOVEMBER 2009

Labour Law — Employment — Dismissal — Dismissal without just cause — Minister's decision not to refer applicant's representation for adjudication to Industrial Court — Whether Minister had committed error of law when he failed to give reasons for decision — Whether Minister acted on no evidence — Whether Minister failed to take into account relevant matters — Industrial Relations Act 1967 s 20(1), (2) & (3)

The applicant had been employed as a fireman by GBH Ceramics Sdn Bhd ('the company') since 9 October 1984. On 27 June 2005, the applicant was suspended from work for alleged misconduct. At a domestic inquiry held by the company on 7 July 2005, two charges were preferred against the applicant, namely that he had lied to his superior officer that one Rusdi bin Muhammadin ('Rusdi') had left the company premises at 7am on 24 June 2005 when he knew that the said Rusdi was absent on 23 June 2005 from 11pm to 7am; and that he was absent from his workplace from 12.05pm on 24 June 24 2005 to 12.30am on 25 June 2005 without seeking the immediate approval of his superior. Vide a letter dated 11 July 2005 the applicant was dismissed with effect from 12 July 2005. The applicant averred that he was not informed by the company of the seriousness of the charges and that it would result in a dismissal. He also averred that the charges were without merit and frivolous but because he did not want to prolong the matter he admitted that the charges were true even though they were not true. When the applicant lodged a complaint with the Director General of Industrial Relations ('the second respondent') that his dismissal was without just cause and excuse, the second respondent called for a conciliation meeting between the company and the applicant. However, when no conciliation was reached between the parties, the second respondent made a report to the Minister ('the first respondent') to this effect. In exercise of his discretion under s 20(3) of the Industrial Relations Act 1967 ('the Act') the Minister refused to refer the applicant's representations to the Industrial Court. This was the applicant's application for an order of certiorari to quash the Minister's decision refusing to refer the applicant's case to the Industrial Court and for an order of mandamus requiring the Minister to refer the same for adjudication. The applicant submitted that the Minister had failed to give reasons for his decision and that he had acted on no evidence even though he

deposed that he had acted on the second respondent's report, as no such report was produced. The applicant further submitted that the Minister had failed to take into account relevant matters in coming to his decision, but had taken into account irrelevant facts, such as acts of misconduct that occurred about nineteen years prior to his dismissal. The Minister responded that he was not required to give reasons for his decision taken under s 20(3) of the Act and that there was no requirement under s 20(2) of the Act for the respondents to disclose the report made by the second respondent to the Minister. The issues for determination in this case were whether the Minister had committed an error of law when he failed to give reasons for his decision not to refer the applicant's case for adjudication to the Industrial Court; whether the Minister had acted on no evidence when making his decision and whether the Minister had failed to take into account relevant matters when coming to his decision.

Held, allowing the application with costs:

(1) It is established law that the Minister was not required to give reasons when he exercise his discretion under s 20(3) of the Act and that the courts could not compel the Minister to give reasons for his decision (see para 10).

(2) Once the dispute between the parties was irreconcilable the second respondent was required to make a report to the Minister. However, there was no requirement under s 20(2) of the Act for the Minister or the second respondent to disclose the report to the applicant or to the company at all (see paras 14–15).

(3) Despite the applicant's challenge, the company had chosen not to exhibit the applicant's job description and the report of the applicant's superior. These documents would have had a direct bearing on the two charges preferred against the applicant. In the light of the conflicting evidence and in the absence of the relevant documents it was not possible to verify whether a reasonable person similarly circumstanced would have arrived at the decision reached by the Minister. As such there was merit in the applicant's argument that the objectivity of the Minister's decision making process had been flawed. The Minister had committed an error of law in not referring the representations made by the applicant for adjudication to the Industrial Court (see para 24–27).

[Bahasa Malaysia summary

Pemohon telah bekerja sebagai seorang ahli bomba di GBH Ceramics Sdn Bhd ('syarikat tersebut') semenjak 9 Oktober 1984. Pada 27 Jun 2005, pemohon telah digantung kerja atas dakwaan salah laku. Semasa siasatan domestik yang dijalankan oleh syarikat pada 7 Julai 2005, dua tuduhan telah disabitkan terhadap pemohon, iaitu dia telah berbohong kepada pegawai

atasannya bahawa Rusdi bin Muhammadin ('Rusdi') telah meninggalkan premis syarikat pada 7 pagi, 24 Jun 2005 sedangkan dia mengetahui Rusdi tidak hadir pada 23 Jun 2005 dari 11 pagi hingga 7 pagi; dan dia tidak hadir ke tempat kerja dari 12.05 petang pada 24 Jun 2005 hingga 12.30 pagi pada 25 Jun 2005 tanpa meminta kebenaran segera pegawai atasannya. Melalui surat bertarikh 11 Julai 2005, pemohon telah dipecat mulai 12 Julai 2005. Pemohon menegaskan bahawa dia tidak dimaklumkan oleh syarikat tentang keseriusan tuduhan-tuduhan tersebut dan ianya akan mengakibatkan pemecatan. Dia juga menegaskan bahawa tuduhan-tuduhan tersebut adalah tidak bermerit dan remeh tetapi oleh kerana dia tidak mahu perkara tersebut berlanjutan, dia telah mengakui bahawa tuduhan-tuduhan tersebut adalah benar walaupun ianya tidak benar. Apabila pemohon membuat aduan kepada Ketua Pengarah Perhubungan Perusahaan ('responden kedua') bahawa pemecatannya adalah tanpa sebab dan alasan yang munasabah, responden kedua telah mengadakan mesyuarat pendamaian antara syarikat dan pemohon. Walau bagaimanapun, apabila pendamaian antara pihak-pihak tersebut tidak dicapai, responden kedua telah membuat laporan kepada Menteri ('responden pertama'). Dalam melaksanakan budi bicaranya di bawah s 20(3) Perhubungan Perusahaan 1967 ('Akta tersebut'), Menteri enggan merujuk representasi pemohon ke Mahkamah Perusahaan. Ini merupakan permohonan pemohon untuk satu perintah certiotari untuk membatalkan keputusan Menteri yang enggan merujuk kes pemohon ke Mahkamah Perusahaan dan untuk satu perintah mandamus yang memerlukan Menteri untuk merujuk kes tersebut untuk kehakiman. Pemohon berhujah bahawa Menteri gagal memberi sebab-sebab untuk keputusannya dan bahawa beliau telah bertindak tanpa apa-apa keterangan, walaupun beliau mendepos bahawa beliau telah bertindak berdasarkan laporan responden kedua, memandangkan laporan tersebut tidak dikemukakan. Pemohon selanjutnya berhujah bahawa Menteri telah gagal untuk mengambilkira perkara-perkara relevan dalam membuat keputusannya, dan sebaliknya telah mengambilkira fakta-fakta yang tidak relevan seperti perbuatan salah laku yang berlaku 19 tahun sebelum pemecatannya. Menteri membalas bahawa beliau tidak perlu memberi sebab-sebab untuk keputusan yang dibuat menurut s 20(3) Akta dan bahawa tiada keperluan di bawah s 20(2) Akta bagi responden-responden untuk mengemukakan laporan yang dibuat oleh responden kedua kepada Menteri. Isu-isu untuk ditentukan dalam kes ini adalah sama ada Menteri telah khilaf dari segi undang-undang apabila beliau gagal memberi sebab-sebab dalam keputusannya untuk tidak merujuk kes pemohon untuk kehakiman di Mahkamah Perusahaan; sama ada Menteri telah bertindak tanpa apa-apa keterangan apabila membuat keputusannya dan sama ada Menteri telah gagal mengambilkira perkara-perkara relevan dalam membuat keputusannya.

Diputuskan, membenarkan permohonan dengan kos:

(1) Adalah undang-undang tetap bahawa Menteri tidak perlu memberi

apa-apa sebab apabila beliau melaksanakan budi bicaranya di bawah s 20(3) Akta dan bahawa mahkamah-mahkamah tidak boleh mendesak Menteri untuk memberi sebab-sebab bagi keputusannya (lihat perenggan 10).

(2) Apabila pertikaian di antara pihak-pihak tidak mencapai pendamaian, responden kedua dikehendaki membuat laporan kepada Menteri. Namun begitu, tidak terdapat apa-apa keperluan di bawah s 20(2) Akta sama sekali bagi Menteri atau responden kedua untuk mengemukakan laporan kepada pemohon atau syarikat tersebut (lihat perenggan 14–15).

(3) Meskipun mendapat tentangan pemohon, syarikat telah memilih untuk tidak mengekshibitkan butir-butir pekerjaan pemohon dan laporan oleh pegawai atasan pemohon. Dokumen-dokumen ini mungkin mempunyai beban secara langsung ke atas kedua-dua tuduhan yang disabitkan terhadap pemohon. Disebabkan oleh keterangan yang bercanggah dan ketiadaan dokumen-dokumen relevan, adalah tidak mungkin untuk mengenalpasti sama ada seorang yang waras di dalam situasi yang sama akan mencapai keputusan yang dicapai oleh Menteri. Oleh itu, terdapat merit dalam hujah pemohon bahawa objektiviti dalam proses membuat keputusan oleh Menteri adalah cacat. Menteri telah khilaf dari segi undang-undang dengan tidak merujuk representasi-representasi yang dibuat oleh pemohon untuk kehakiman di Mahkamah Perusahaan (lihat perenggan 24–27).]

Notes

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 948–1000.

Cases referred to

Exxon Chemical (M) Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors [2007] 3 MLJ 1, FC (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)

Joseph Puspam v Menteri Sumber Manusia & Anor [2001] 4 CLJ 252, CA (refd)

Kathiravelu Ganesan & Anor v Kojasa holdings Bhd [1997] 2 MLJ 685, SC (refd)

Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor [1988] 3 MLJ 204, SC (refd)

Minister of Labour, Malaysia v Chan Meng Yuen and another appeal [1992] 2 MLJ 337, SC (refd)

Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)

Minister of Labour, Malaysia v Sanjiv Oberoi & Anor [1990] 1 MLJ 112, SC (refd)

A *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, FC (refd)

Legislation referred to

Industrial Relations Act 1967 s 20, 20(1), (2), (3)
B Rules of the High Court 1980 O 53 r 3(2)

Dominic Selvam (Shima Rajandran) for the applicant.
Nik Mohd Noor bin Nik Kar (Senior Federal Counsel, Attorney General's Chambers) for the respondents.
C

Lau Bee Lan J:

D **[1]** Vide an application dated 23 February 2007 (encl 1) read with encl 8 (Form 111B) the applicant has applied for an order of certiorari to quash the decision of the first respondent, the honourable Minister of Human Resources ('the Minister/first respondent') dated 19 December 2006 who refused to refer the representation of the applicant under s 20(3) of the
E Industrial Relations Act 1967 ('the IRA') for adjudication to the Industrial Court; and for an order of mandamus requiring the Minister to refer the same to the Industrial Court.

F **[2]** The undisputed facts of the application are as follows. The applicant commenced employment as a trainee fireman with the GBH Ceramics Sdn Bhd (previously known as Goh Ban Huat Sdn Bhd ('the said company') on 9 October 1984 (exh RK1); on 14 October 1991 he was promoted to assistant manager — firing and drying section (exh RK2); on 28 February
G 1986, whilst on duty as a fireman he was given a 'serious warning' by the company for negligence to follow up on the work of a new recruit thus causing a loss to the said company and that severe disciplinary action will be taken against him for repetition of the same offence (exh R4). On 13 July 2005 he had lodged a complaint with the Director-General of Industrial
H Relations ('the second respondent') that his dismissal was without just cause and excuse (exh RK7). On 9 August 2005 a conciliation meeting was called by the second respondent between the said company and the applicant (exh RK8); no conciliation was reached between the parties and this was informed to the Minister vide a letter dated 2005 to the DGIR enclosing a
I report ('laporan terakhir') (exh RK9). Vide a letter from the DGIR dated 11 January 2007 (exh RK10) and received by the applicant on 17 January 2007, the applicant was informed by the Minister that pursuant to s 20(3) of the IRA his representation that his dismissal was without just cause and excuse was not a fit and proper case to be referred to the Industrial Court.

[3] The disputed facts are as follows:

(a) On 31 May 2004 the applicant alleged he was wrongly accused for an explosion at the factory of the said company and he denied being in any way responsible for the incident.

(b) On 27 June 2005 he was suspended from work for alleged misconduct (exh RK5).

(c) On 7 July 2005 pursuant to a domestic inquiry held by the said company, the applicant was charged for the following offences:

(i) On June 23 2005, you lied to your immediate superior En Nor Mohd Zin when you told him that En Rusdi bin Muhammadin (C 4607) had left the company premises at 7.00am on June 24, 2005. In fact, you knew that En Rusdi bin Muhammadin (C 4607) was absent on June 23, 2005 (11.00pm to 7.00am);

(ii) On June 24, 2005, you were not at your workplace between 12.05pm to 12.30am (Jun 25, 2005) without seeking prior approval from your immediate superior. You were seen coming in at 12.30am.

(d) The applicant averred that he was not informed by the said company of the seriousness of the charges and that it would result in a dismissal. He further averred that as the charges were without merit and frivolous and because he did not want to prolong the matter he admitted to the charges even though he realised the charges were not true; he was shocked when he was informed vide letter dated 11 July 2005 that he was dismissed with effect from 12 July 2005 (exh RK6).

(e) The applicant averred at the conciliation meeting no facts were gathered by the second respondent and neither was an explanation requested by the second respondent; and neither was the applicant requested to provide particulars of his dismissal and he believed likewise for the company.

(f) There is a company practice that shift workers were permitted to take a break for a meal when the occasion permits and there was no fixed time ('Adalah amalan syarikat bahawa pekerja yang bekerja di dalam syif dibenarkan berihat seketika apabila kami ada masa untuk berehat'/'Adalah suatu amalan dan dengan persetujuan majikan bahawa saya boleh keluar makan pada masa yang sesuai dan tiada masa yang tetap dikenakan').

[4] The court has considered the written submissions of learned counsel for the applicant (encls 18 and 23), learned SFC for the first and second respondents (encls 20 and 25). The court's findings include the following.

[5] From the affidavit in support affirmed by the applicant on 16 February 2007 (encl 3), affidavit in reply of the respondents affirmed by the Minister on 16 February 2009 (encl 14) and the affidavit in reply of the applicant (to encl 14) affirmed by the applicant on 6 April 2009 (encl 16) and the statement filed by the applicant pursuant to O 53 r 3(2) of the Rules of the High Court 1980 ('the RHC') it can be gleaned that the applicant's grounds of challenge are mounted on the following are:

(a) the first respondent failed to give reasons for his decision;

(b) the Minister acted on no evidence when making the decision not to refer the matter to the Industrial Court; and

(c) the first respondent failed to take into account relevant matters and instead took into account irrelevant matters in coming to his decision.

FAILURE TO GIVE REASONS (FIRST GROUND)

[6] In relation to the first ground, learned counsel for the applicant submitted that the first respondent committed an error of law when he failed to give reasons for his decision and the Court of Appeal case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 was cited.

[7] The first respondent submitted he is not required to give reasons for his decision citing:

(a) s 20 of the IRA;

(b) *Minister of Labour, Malaysia v Sanjiv Oberoi & Anor* [1990] 1 MLJ 112 at p 113;

(c) *Minister of Labour, Malaysia v Chan Meng Yuen and another appeal* [1992] 2 MLJ 337 (SC) at p 341; and

(d) *Joseph Puspam v Menteri Sumber Manusia & Anor* [2001] 4 CLJ 252.

[8] Section 20(3) of the IRA states 'Upon receiving the notification of the Director General under sub-s (2), the Minister may, if he thinks fit, refer the representations to the court for an award'.

[9] The position taken by the applicant in relying on *Hong Leong Equipment Sdn Bhd* in support of the proposition that the Minister has failed to give reasons for his refusal to refer the applicant's representation to the Industrial Court is in fact the sole ground relied on by the appellant in the case of *Joseph Puspam*. In addressing this point, the Court of Appeal in the aforesaid case, at p 257 para c-e opined 'With the greatest respect to Mr

Karpal Singh, it is clear to me that the above passages do not subscribe to the idea that the Minister should be compelled to give reasons for his decision and this is reflected in the last para 1 have cited. His Lordship only said that 'it is a matter of prudence that the Minister is required to give reasons for his decision'. 'The last paragraph' in *Joseph Puspam*, referred to by Mokhtar Sidin JCA (as he then was) is 'Of course, he may not be procedurally compelled to furnish them: see *Sanjiv Oberoi*. *But if he gives no reason or inadequate reasons, then, it is open for a court to conclude that he had no good reasons for making the decision he did. The reasons he gives are, of course, subject to curial scrutiny for the purpose of determining whether he had exercised his discretion in accordance with law'*. (Emphasis added.)

[10] The Court of Appeal at p 258 further held that there are numerous authorities where it is established that the Minister is not required to give reasons when he exercises his discretion under s 20(3) of the IRA and stated it was sufficient for them to cite the Supreme Court cases of *Sanjiv Oberoi & Anor* and *Chan Meng Yuen and another appeal* and at p 259 para h stated 'From the authorities cited above, it is clear that the Minister in exercising his discretion under s 20(3) of the Industrial Relations Act 1967 is not required to give reason for exercising that discretion. The courts cannot compel the Minister to give reasons for his decision'.

[11] Therefore the first ground of the applicant is misconceived.

ACTED ON NO EVIDENCE (SECOND GROUND)

[12] In respect of this second ground, the applicant contended that the Minister has committed an error of law in that the Minister has acted on no evidence when he deposed he had acted on the 'report', however no 'report' was produced and had not shown any awareness of the facts of the case; the Minister relied on the facts deposed in the affidavit in support of the applicants to reply to the averments of the applicant and cited the case of *Malayan Banking Bhd v Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 Held (1)–(4) (HC).

[13] Firstly, I wish to point out in *Malayan Banking Bhd* when His Lordship, KC Vohrah J (as he then was) stated that the supervisory court can only review a decision on the substance of the tribunal if the tribunal has committed an error, inter alia, where there is no evidence to support its conclusion, His Lordship followed the Federal Court case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 'No evidence to support a conclusion' does not mean a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonable capable of supporting the finding, or where no tribunal could reasonably

reach that conclusion on that evidence'. I shall address this point on whether the Minister acted reasonably in reaching his conclusion hereafter.

[14] I agree with the learned SFC for the respondents' submission there is no requirement under s 20(2) of the IRA for the Minister or the DGIR to disclose the report. This is apparent from the provision of s 20(2) itself:

> (2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, *he shall notify the Minister accordingly*. (Emphasis added.)

[15] Further, in *Kathiravelu Ganesan & Anor v Kojasa holdings Bhd* [1997] 2 MLJ 685 at pp 694-695, His Lordship Gopal Sri Ram JCA (now Federal Court judge) had referred to the four different levels in the context of the IRA, the conciliatory level (s 20(1)), the reporting level (s 20(2)), the referral level (s 20(3)) and the adjudicatory level where the Industrial Court is seised with jurisdiction to determine the dispute. With regard to the reporting level, His Lordship at p 694 stated 'Once the Director General of Industrial Relations finds the dispute irreconcilable, he merely makes his report to the Minister'. By virtue of the word 'merely' it can be inferred that pursuant to s 20(2) of the IRA, there is no requirement for the DGIR to make the report available to the applicant or to the said company at all.

NON-CONSIDERATION OF RELEVANT MATTERS OR CONSIDERATION OF IRRELEVANT MATTERS (THIRD GROUND)

[16] The applicant contended that the Minister acted on incorrect or lack of evidence which could be inferred from his failure to produce any palpable evidence which he purported to have referred in arriving at the decision; and he did not address his mind to the findings of the second respondent as there was none.

[17] The Minister submitted that he had considered all matters alluded to by the applicant including those raised in his affidavit in support which were disputed by the applicant and all the particulars in the report forwarded to the Minister; that the applicant has not produced any evidence that the Minister had exercised his discretion unlawfully or with improper motive and the mere fact that the Minister had acted in a negative manner is insufficient to render his decision an improper exercise of his discretion.

[18] The approach to be adopted by the court is as propounded in *Exxon Chemical (M) Sdn Bhd v Menteri Sumber Manusia, Malaysia & Ors* [2007] 3

MLJ 1 (FC) where the duty of the reviewing court is to conduct an objective examination of the facts placed before the Minister at the material time to ascertain whether a reasonable person, similarly circumstanced would have arrived at the same decision as the first respondent, the Minister had acted based on the facts.

[19] In *Kathiravelu Ganesan & Anor* His Lordship Gopal Sri Ram JCA stated at the referral level the Minister must adhere to the 'Hashim Yeop test' namely, to consider whether having regard to the facts and circumstances of the given case, the representation made by the workman is frivolous or vexatious. In *Minister of Labour, Malaysia v Lie Seng Fatt* [1990] 2 MLJ 9 at p 12 Hashim Yeop A Sani CJ (Malaya) (as he then was) said 'The Minister's discretion under s 20(3) is wide but not unlimited. As stated earlier, so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute. Otherwise he had a complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious which in our view this is one'.

[20] What then are the facts placed before the Minister at the material time? Upon a perusal of the afidavits I find the Minister has averred 'Saya sesungguh menyatakan bahawa melalui spot check yang dibuat oleh Encik Nor Mohamed Zin (Plant Manager) pada 23.6.2005 dan 24.6.2005, syarikat tersebut mendapati bahawa Pemohon telah melakukan kesalahan.' (para11 of the respondents' affidavit in reply) and '(B)erdasarkan memo bertarikh 25.6.2005 iaitu laporan oleh Plant Manager kepada Encik Baljit Kaur (sic) (General Manager Human Resource), jelas menunjukkan bahawa spot check yang dilakukan pada 24.6.2005 (sic) dan 24.6.2005, Encik Nor Mohamed Zin telah bertanyakan kepada Pemohon perihal ketiadaan Encik Rusdi yang seharusnya bertugas' (para 17 of the respondents' affidavit in reply).

[21] The applicant in rebuttal averred 'Saya menafikan bahawa terdapat lelaki yang bernama Encik Baljit Kaur yang menjawat jawatan yang didakwa itu. Saya tiada pengetahuan mengenai sebarang lapuran yang didakwa dibuat oleh Encik Nor Mohamed Zin tersebut yang didakwa bertarikh 25-6-2005 atau mana-mana lapuran yang lain. Malah saya menafikan ujudnya lapuran yang didakwa tersebut kerana jika benar-benar wujud sudah tentu Responden-Responden akan mengekhsibitkannya' (para 14 of the applicant's affidavit in reply in encl 16).

[22] The Minister, inter alia, averred '(Pemohon) juga harus sedia maklum bahawa beliau tidak boleh meninggalkan KILN tanpa pengawasan. *Merujuk*

kepada JOB Description Pemohon, dan amaran yang diberikan kepada Pemohon, *adalah jelas dinyatakan bahawa Pemohon tidak boleh 'leave the KILN unattended'*. Pemohon walau bagaimanapun telah keluar makan bersama rakannya dan KILN tersebut telah ditinggalkan tanpa pengawasan' (Emphasis added.) (para 16 of the respondents' affidavit in reply).

[23] In rebuttal, the applicant averred:

> Saya mengatakan bahawa saya adaiah Penolong Pengurus dan bukan kakitangan yang mengendalikan *kiln* tersebut. Dalam keadaan demikian, tugas saya adalah sebagai penyelia sahaja dan bukan sebagai penjaga *kiln*. *Saya meletakkan Responden-Responden pada beban bukti yang kukuh untuk mengemukakan 'JOB SPECIFICATION' seperti yang didakwa tersebut. Saya juga menafikan bahawa amaran pernah diberi seperti yang didakwa. Saya menegaskan bahawa adalah suatu amalan dan juga didalam pengetahuan penuh serta dengan persetujuan majikan saya bahawa saya boleh keluar makan pada masa yang sesuai dan tiada masa yang tetap dikenakan*.

(para 13 of the applicant's affidavit in reply in encl 16).

[24] It is indeed odd why despite the challenge by the applicant, the respondents have chosen not to exhibit the applicant's 'Job Description' and the report of Encik Nor Mohamad Zin which in my opinion has a direct bearing on the two charges preferred against the applicant in the dismissal letter namely:

> (1) On June 23, 2005, you lied to your immediate superior En Nor Mohd Zin when you told him that En Rusdi bin Muhammadin (C4607) had left company premises at 7.00am on June 24, 2005. In fact, you knew that En Rusdi bin Muhammadin (C4607) was absent on June 23, 2005 (11.00pm to 7.00am)
>
> (2) On June 24, 2005, you were not at your workplace between 12.05pm to 12.30am (Jun 25, 2005) without seeking prior approval from your immediate superior. You were seen coming in at 12.30am.

[25] In the light of conflicting evidence and in the absence of the relevant documents this court is unable to verify whether a reasonable person similarly circumstanced would have arrived at the decision reached by the Minister. Therefore it cannot be said that the representation of the applicant is clearly frivolous or vexatious.

[26] The applicant submitted that the respondents had taken into account irrelevant facts of prior acts of misconduct that occurred about 19 years prior to the dismissal (exh RK4 letter from the said company to the applicant dated 28 February 1986) instead of focusing on the incident that was alleged to

have occurred on 23 June 2005 and 24 June 2005. I find there is merit in this argument as the objectivity of the Minister's decision making process has been flawed.

[27] For the foregoing reasons I find that the Minister has committed the errors of law in not referring the representation of the applicant to the Industrial Court as it is not frivolous or vexatious. Accordingly, I grant OIT of the applicant's application:

(a) an order of certiorari to quash the Minister's decision dated 19 December 2006;

(b) an order of mandamus directing the Minister to refer the representation of the applicant to the Industrial Court; and

(c) costs to the applicant to be taxed unless otherwise agreed.

Application allowed with costs.

Reported by Kohila Nesan